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In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD LEE MUSCHIK

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

QUESTION PRESENTED

Whether the weight assigned to a dosage unit of LSD by the Sentencing Commission for purposes of calculating a defendant's offense level under Sentencing Guidelines § 2D1.1 also governs the determination of the weight of the "mixture or substance" containing LSD for purposes of applying the mandatory minimum sentencing provisions of 21 U.S.C. 841(b).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the United States, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-14a) is reported at 49 F.3d 512. A prior opinion of the court of appeals (App., *infra*, 15a-20a) is unreported, but the judgment is noted at 995 F.2d 234 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 28, 1995. A petition for rehearing was denied on May 1, 1995. App., *infra*, 26a-27a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS AND SENTENCING GUIDELINE INVOLVED

1. Section 841 of Title 21, United States Code (1988 & Supp. V 1993) provides, in pertinent part:

> (a) **Unlawful acts**
>
> * * * [I]t shall be unlawful for any person knowingly or intentionally—
>
> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance[.]
>
> * * * * *
>
> (b) **Penalties**
>
> * * * [A]ny person who violates subsection (a) of this section shall be sentenced as follows:
>
> (1)(A) In the case of a violation of subsection (a) of this section involving * * *
>
> * * * * *
>
> (v) 10 grams or more of a mixture or substance containing a detectable amount of lysergic acid diethylamide (LSD); * * *
>
> such person shall be sentenced to a term of imprisonment which may not be less than 10 years or more than life[.] * * * If any person commits such a violation after a prior conviction for a felony drug offense has become final, such person shall be sentenced to a term of imprisonment which may not be less than 20 years and not more than life imprisonment[.]

2. Section 846 of Title 21, United States Code, provides: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

3. Sentencing Guidelines § 2D1.1(c) n.* (Nov. 1, 1993) provides, in pertinent part: "In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table."

STATEMENT

After entering a guilty plea in the United States District Court for the District of Montana, respondent was convicted of conspiracy to distribute lysergic acid diethylamide (LSD), in violation of 21 U.S.C. 846, and was sentenced to 20 years' imprisonment, to be followed by ten years' supervised release. The court of appeals vacated respondent's sentence and remanded for resentencing. App., *infra*, 2a, 28a.

1. On March 12, 1992, respondent pleaded guilty to conspiracy to distribute LSD, in violation of 21 U.S.C. 846. At a sentencing hearing, the district court determined that respondent's offense involved 14,200 dosage units of LSD, and that the combined weight of the LSD and the blotter paper on which it was carried was 101 grams. Because the offense involved more than ten grams of a "mixture or substance" containing LSD (including the carrier medium), and because respondent had a prior felony conviction for a drug offense, the district court sentenced respondent to a mandatory minimum

sentence of 20 years' imprisonment, pursuant to 21 U.S.C. 841(b)(1)(A)(v).[1] See *Chapman* v. *United States*, 500 U.S. 453, 468 (1991) (Section 841(b) "requires the weight of the carrier medium to be included when determining the appropriate [mandatory minimum] sentence for trafficking in LSD"). The court of appeals affirmed respondent's conviction but remanded for resentencing under the procedures required by 21 U.S.C. 851(b) before a defendant's sentence may be increased based on a prior conviction. App., *infra*, 15a-20a.

2. On November 1, 1993, before respondent's resentencing, the Sentencing Commission amended Guidelines § 2D1.1(c), through Amendment 488, to provide:

> In the case of LSD on a carrier medium (*e.g.*, a sheet of blotter paper), do not use the weight of the LSD/carrier medium. Instead, treat each dose of LSD on the carrier medium as equal to 0.4 mg of LSD for the purposes of the Drug Quantity Table.

Guidelines § 2D1.1(c) n.* (Nov. 1, 1993); see United States Sentencing Comm'n, *Guidelines Manual* App. C, at 951 (Nov. 1, 1993). The Commission also amended the background to the commentary on Section 2D1.1 to explain that its approach "harmonize[d] offense levels for LSD offenses with those for other controlled substances and avoid[ed] an undue influence of varied carrier weight on the applicable

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[1] When a drug offense involves ten grams or more of a "mixture or substance containing a detectable amount" of LSD, Section 841(b)(1)(A)(v) requires a minimum sentence of ten years' imprisonment. If a defendant has a prior conviction for a felony drug offense, Section 841(b)(1)(A)(v) requires a minimum sentence of 20 years' imprisonment.

offense level." Guidelines § 2D1.1, commentary (background) (Nov. 1, 1993). The Commission further explained, however, that its "approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence." *Ibid.* (citing *Chapman* and Guidelines § 5G1.1(b) (Nov. 1, 1993)).

Respondent was resentenced on December 6, 1993. Using the standard weight of 0.4 milligrams per dosage unit of LSD set forth in amended Guidelines § 2D1.1, the presentence report recalculated the weight of the 14,200 dosage units to be 5.68 grams, which would have resulted in respondent's receiving a mandatory minimum ten-year term of imprisonment under 21 U.S.C. 841(b)(1)(B)(v).[2] The district court concluded, however, that this Court's decision in *Chapman v. United States*, *supra*, rather than the standard weight assigned to doses of LSD in Guidelines § 2D1.1(c), governs the determination of the weight of the LSD for purposes of applying the mandatory minimum sentencing provisions of Section 841(b). App., *infra*, 24a-25a. Accordingly, based on the combined weight of the LSD and the blotter paper, 101 grams, the district court again sentenced respondent to 20 years' imprisonment. *Id.* at 21a, 25a.

3. The court of appeals vacated the sentence and remanded for resentencing. App., *infra*, 1a-14a. The

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[2] When a drug offense involves one gram or more of a "mixture or substance containing a detectable amount" of LSD, Section 841(b)(1)(B)(v) imposes a mandatory minimum sentence of five years' imprisonment. If a defendant also has a prior conviction for a felony drug offense, Section 841(b)(1)(B)(v) imposes a mandatory minimum sentence of ten years' imprisonment.

court of appeals held that the standard weight assigned to doses of LSD in amended Guidelines § 2D1.1 also governs the determination of the weight of the "mixture or substance" containing LSD for purposes of applying the mandatory minimum sentencing provisions of Section 841(b). App., *infra*, 6a-13a.

The court acknowledged that, in *Chapman*, this Court held that Section 841(b) requires the weight of the carrier medium to be included when determining the appropriate sentence under the statute for LSD offenses. App., *infra*, 5a. The court reasoned, however, that the Sentencing Commission's assignment of a standard weight to a dosage unit of LSD is consistent with *Chapman*'s directive to take carrier weight into account because the Sentencing Commission had "merely standardize[d] the amount of [the] carrier medium" that is mixed with the drug. *Id.* at 9a. The court stated that the Sentencing Commission had chosen the weight of 0.4 milligrams per dose in order to "perpetuate the rationale behind *Chapman*" (*id.* at 9a n.6); according to the Sentencing Commission, the LSD accounted for only 0.05 milligrams per dose, and the remaining 0.35 grams represented the weight of the carrier. *Ibid.* The court also believed that applying the Sentencing Commission's standard weight furthered the "market-oriented" approach to sentencing for drug crimes emphasized in *Chapman* because "LSD, unlike most other drugs, is not sold by weight but by dose." *Id.* at 10a.

The court noted that Amendment 488 had taken effect only after the Sentencing Commission had transmitted the amended Guideline for review by Congress, which took no action to modify or delay it.

Observing that "Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest," App., *infra*, 12a, the court believed that it "should not assume that Congress has made conflicting policy decisions regarding LSD weight in the areas of mandatory minimum and Guideline sentencing when those decisions may be so easily harmonized." *Ibid.* The court thus concluded that using the amended version of Guidelines § 2D1.1(c) to determine LSD weight under the mandatory-minimum statutes was consistent with *Chapman* since "[t]he Commission intended to leave *Chapman* intact—through the amendment, the Commission merely intended to standardize the amount of carrier medium that can be viewed as 'mixed' with LSD." App., *infra*, 13a. The court rejected the contrary conclusion of four other circuits because that conclusion "results in a dual system of calculating LSD weight." *Ibid.*

REASONS FOR GRANTING THE PETITION

This case presents the same issue that is presented in *Neal* v. *United States*, cert. granted, No. 94-9088 (June 19, 1995). The issue in both cases is whether the weight assigned to a dose of LSD by the Sentencing Commission for purposes of calculating a defendant's offense level under Sentencing Guidelines § 2D1.1 also governs the determination of the weight of the "mixture or substance" containing LSD for purposes of applying the mandatory minimum sentencing provisions of 21 U.S.C. 841(b). In this case, the Ninth Circuit held that the dosage weight set by Sentencing Guidelines § 2D1.1(c) should be used in

determining whether respondent should be sentenced to the statutory minimum sentence provided by Section 841(b). The Court granted certiorari in *Neal* to review a contrary decision of the Seventh Circuit on the same issue. Because the Court's decision in *Neal* will govern this case, we suggest that the Court hold the petition in this case and dispose of it in light of the decision in *Neal*.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in *Neal* v. *United States*, cert. granted, No. 94-9088 (June 19, 1995), and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

JULY 1995

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93-30461

D.C. No. CR 91-00072-CCL

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICHARD LEE MUSCHIK, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Montana

[Filed FEB. 28, 1995]

OPINION

Before: HARLINGTON WOOD, JR.,* PROCTER HUG, JR., and THOMAS TANG, Circuit Judges.

WOOD, JR., Circuit Judge:

Following the Ninth Circuit's remand, Richard Lee Muschik was resentenced on December 6, 1993, to a prison term of twenty years pursuant to the

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* The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, is sitting by designation.

mandatory minimum sentence set forth in 21 U.S.C. § 841(b)(1)(A). Muschik had been earlier found guilty of escape in violation of 18 U.S.C. § 751 and pleaded guilty to conspiracy to distribute lysergic acid diethylamide ("LSD") in violation of 21 U.S.C. §§ 841(a)(1) and 846. In his appeal, Muschik argues that the district court erroneously concluded that ten grams or more of LSD were involved in this case. Muschik contends that the entire weight of the carrier medium should not be included when the weight of LSD is calculated. Instead, Muschik argues that the formula set forth in the November 1, 1993 amendment to U.S.S.G. § 2D1.1(c) should be used to determine the net weight of LSD involved for sentencing purposes. For the reasons given below, we vacate the sentence imposed by the district court and remand for resentencing in accordance with this opinion.

I.

BACKGROUND

Richard Lee Muschik was arrested on May 24, 1991, by the Drug Enforcement Administration ("DEA") pursuant to a Complaint charging him with conspiracy to possess with intent to distribute and actual distribution of LSD in violation of 21 U.S.C. §§ 841(a)(1) and 846. On October 23, 1991, Muschik escaped from federal custody while awaiting trial on the drug charges. Muschik was apprehended again on November 28, 1991, and detained. On January 28, 1992, Muschik was convicted of escape in violation of 18 U.S.C. § 751.

On March 12, 1992, Muschik pleaded guilty to conspiracy to distribute LSD in violation of 18 U.S.C. §§ 841(a)(1) and 846. On May 26, 1992, the district court combined the escape and drug charges for sentencing and then determined that the amount of

LSD involved required application of the mandatory minimum provision of 21 U.S.C. § 841(b)(1)(A). Pursuant to this statute, and in light of Muschik's prior state felony drug conviction, Muschik was sentenced to a term of twenty years.

Muschik appealed these convictions and the sentence. We affirmed the escape and drug convictions, but vacated the district court's sentence and remanded for resentencing in strict compliance with the inquire and inform provisions of 21 U.S.C. § 851(b) regarding the enhancement of Muschik's sentence for recidivism. *United States v. Muschik*, 995 F.2d 234 (9th Cir. 1993).

Prior to the district court's resentencing, the U.S. Sentencing Commission amended the Sentencing Guidelines and changed the manner in which the weight of LSD is calculated for sentencing purposes. U.S.S.G. § 2D1.1(c) (1993) (as amended by U.S.S.G. app. C, amend. 488 (1993)) ("Amendment 488"). Under the prior method, which includes the entire weight of the carrier medium, it was determined that Muschik possessed 101 grams of LSD. In preparation for resentencing, the United States Probation Office recalculated the weight of this LSD under the amended guidelines, which establish a standard weight of 0.4 milligram per dosage of LSD, and arrived at a weight of 5.68 grams.

On December 6, 1993, the district court nevertheless resentenced Muschik to a term of twenty years—a term of the same length as it had imposed originally. Muschik appeals.

II.

ANALYSIS

We review the district court's interpretation and application of the Sentencing Guidelines *de novo*. *United States v. Conkins*, 987 F.2d 564, 571 (9th Cir. 1993). The district court's other legal determinations in this regard are also reviewed *de novo*. *United States v. Anderson*, 895 F.2d 641, 644 (9th Cir. 1990). To the extent that the district court has made any factual determinations, the clearly erroneous standard applies. *Id.*

A.

Title 21 U.S.C. § 841(b)(1)(A)(v) imposes a mandatory minimum sentence of ten years imprisonment for a violation of § 841(a)[1] where there is involved "10 grams or more of a mixture or substance containing a detectable amount" of LSD. Section 841(b)(1)(B)(v) imposes a mandatory minimum sentence of five years imprisonment where there is involved "1 gram or more of a mixture or substance containing a detectable amount" of LSD. Both sections provide for a

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[1] In relevant part, § 841(a) provides:

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally—

(1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance . . . ."

Muschik actually pleaded guilty to conspiracy to distribute LSD in violation of 21 U.S.C. § 846, but that section states: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

doubling of the mandatory minimum sentence where the defendant has one or more prior felony drug convictions. Thus, it is obvious that properly determining the weight of LSD involved in a given case is of paramount importance for sentencing purposes.

The calculation of LSD weight is difficult, however, because the quantity of the actual drug present in each dose is infinitesimal—the DEA assigns a standard weight for LSD of only 0.05 milligram per dosage unit. To facilitate transportation, distribution and use of LSD, it is commonly dissolved in solvent and then spread upon a medium—usually blotter paper, gelatin, or a sugar cube. This inactive carrier medium typically far outweighs the LSD itself; thus, there exists the potential for wide variances in sentencing based upon nothing more than the happenstance weight of the particular carrier chosen by a given defendant.

In *Chapman v. United States*, 500 U.S. 453, 468 (1991), the Supreme Court held that the term "mixture or substance" present in 21 U.S.C. § 841(b)(1) includes the entire weight of the carrier medium.[2] The district court relied upon *Chapman* to calculate the weight of LSD involved in this case. With the

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[2] The *Chapman* Court answered concerns of possible unfairness that may result where variations in the weight of the inert carrier medium cause otherwise similarly situated defendants to receive different sentences by stating:

> Although LSD is not sold by weight, but by dose, and a carrier medium is not, strictly speaking, used to "dilute" the drug, that medium is used to facilitate the distribution of the drug. Blotter paper makes LSD easier to transport, store, conceal, and sell. It is a tool of the trade for those who traffic in the drug, and therefore it was rational for Congress to set penalties based on this chosen tool.

Chapman, 500 U.S. at 466.

entire weight of the carrier medium thus included, the amount of LSD involved was determined to be 101 grams—well over the ten gram benchmark required for the imposition of the ten year mandatory minimum sentence established by 21 U.S.C. § 841(b)(1)(A). In light of Muschik's prior state felony drug conviction, the district court followed § 841(b)(1)(A) and doubled the mandatory minimum sentence to twenty years.

B.

Muschik does not contest the holding of *Chapman* directly, but instead contends that the November 1, 1993 amendment to § 2D1.1(c) of the Sentencing Guidelines compels a recalculation of the weight of the LSD as the amendment postdates both the *Chapman* decision and the Ninth Circuit's remand for resentencing. Since there is no *ex post facto* clause problem involved here, as Muschik is certainly not disadvantaged by the amendment, the Guidelines that are in effect upon Muschik's resentencing must be applied. *United States v. Fagan*, 996 F.2d 1009, 1018 (9th Cir. 1993). The question presented here concerns the actual nature of the changes wrought by the amendment to § 2D1.1(c) and the relation of that amendment to *Chapman* and the mandatory minimum statutes.

III.

We begin by noting that this precise issue has already been addressed, with differing results, by several other circuits. We find the reasoning of the Eighth Circuit as expressed in *United States v. Stoneking*, 34 F.3d 651 (1994), a late case not cited to us by the parties, persuasive and herein adopt it for

our own.[3] Nor did the district court have the benefit of this late case. We reject the contrary result reached by the Seventh, Fifth, Tenth and First Circuits. *See United States v. Neal*, 46 F.3d 1405 (7th Cir. 1995) (en banc); *United States v. Pardue*, 36 F.3d 429 (5th Cir.1994); *United States v. Mueller*, 27 F.3d 494 (10th Cir. 1994); *United States v. Boot*, 25 F.3d 52 (1st Cir. 1994).

A.

As an initial matter, it is clear that where a statute and a Guideline conflict, the statute controls.[4] Therefore, to grant full effect to Amendment 488, we must find that the amendment does not conflict with the mandatory minimum provisions at issue here. Our review of the amendment, the relevant provisions of the statute, and the policy considerations behind each leads us to conclude that Amendment 488 and the statute do not conflict.

As discussed above, the Supreme Court in *Chapman* held that the term "mixture or substance" found in 21 U.S.C. § 841(b)(1) "requires the weight of the carrier medium to be included when determining the appropriate sentence for trafficking in LSD." *Chapman*, 500 U.S. at 468. At the time Chapman was decided, however, neither the Sentencing Guidelines

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[3] The Eighth Circuit subsequently vacated the *Stoneking* opinion and granted an *en banc* rehearing. As of the date of our decision in this case, the *en banc Stoneking* opinion has not yet been issued. Regardless of the Eighth Circuit's eventual decision in this case, we remain impressed by the reasoning expressed in the original opinion.

[4] *See, e.g.*, U.S.S.G. § 5G1.1(b) (1993) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.").

nor § 841(b)(1) defined the words "mixture" or "substance." Therefore, the Supreme Court utilized dictionary-supplied definitions.[5] The Supreme Court determined that blotter paper fell within its definition of "mixture or substance" because "[t]he LSD crystals are inside of the paper, so that they are commingled with it, but the LSD does not chemically combine with the paper. Thus, it retains a separate existence . . . The LSD is diffused among the fibers of the paper." *Id.* at 462.

One important factor behind the *Chapman* decision was that the Supreme Court was there presented with only two choices: utilize the negligible net weight of the pure LSD or utilize the gross weight of the pure LSD together with its carrier medium. "Faced with that choice, the Court could only choose the gross weight, in keeping with the fact that the weights of other drugs include dilutants and cutting agents, and in keeping with the market-oriented approach adopted by the Guidelines." *Stoneking*, 34 F.3d at 654; *see also Neal*, 46 F.3d at 1414-15 (Ripple, J., dissenting). The advent of Amendment 488 presents a third option: A court may now utilize an assigned rational weight for the calculation of sentences.

It is our belief that the assignment of a uniform and rational weight to LSD on a carrier medium does not

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[5] The Supreme Court found:

> A "mixture" is defined to include "a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence." . . . A "mixture" may also consist of two substances blended together so that the particles of one are diffused among the particles of the other.

Id. at 462 (citations omitted).

conflict with *Chapman*. In fact, the background commentary to § 2D1.1, as amended by Amendment 488, expressly states that "this approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence (*see Chapman*; § 5G1.1(b))." Rather than "overriding" *Chapman*'s interpretation of "mixture or substance," the formula set forth in Amendment 488 merely standardizes the amount of carrier medium that can be properly viewed as "mixed" with the pure drug.

Chapman held that it was rational to include the weight of the carrier medium for sentencing purposes since that medium facilitates the transportation, storage, concealment, and sale of the drug. *Chapman*, 500 U.S. at 466. Amendment 488 accounts for this facilitation by selecting a standard dosage weight eight times the actual weight of the pure LSD[6] which simultaneously eliminates the potential for undue sentencing disparities,[7] the existence of

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[6] The background commentary to U.S.S.G. § 2D1.1, as amended by Amendment 488, makes clear the Sentencing Commission's intent to perpetuate the rationale behind *Chapman*:

> The dosage weight of LSD selected exceeds the [DEA]'s standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes . . . the decision in *Chapman v. United States*, [500 U.S. 453] (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed).

[7] For example, before Amendment 488 took effect, a drug trafficker would receive the mandatory minimum sentence of five years for one gram or more of LSD under 21 U.S.C.

which even the *Chapman* Court acknowledged. *See Chapman*, 500 U.S. at 466. As the Eighth Circuit found,

> [b]y assigning a sentencing weight per dose that is eight times the actual weight of the pure drug, the Sentencing Commission has determined, in effect, that .05 mg of LSD can be absorbed in, or chemically bonded with, a carrier eight times its weight. Thus, Amendment 488 remains true to the *Chapman* mandate that the weight of the carrier must be included if the carrier can be said to be bonded with or mixed with the drug.

Stoneking, 34 F.3d at 654 (footnote omitted). The framework of *Chapman* thus remains intact while the theoretical foundation upon which it sits is strengthened.

B.

Amendment 488 also leaves intact another concern behind the *Chapman* decision, the maintenance of a "market-oriented" approach to drug sentencing. This approach looks to "the total quantity of what is distributed, rather than the amount of pure drug involved . . . to determine the length of the sentence." *Chapman*, 500 U.S. at 461 (citation omitted). Standardizing the weight value of LSD furthers this market-oriented approach because LSD, unlike most other drugs, is not sold by weight but by dose. The price of a dose of LSD is set without any regard to the weight of carrier medium. Amendment 488 thus furthers the market-oriented approach by hinging sentencing upon the number of doses sold, rather

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§ 841(b)(1)(B) by selling either 1/2 of a sugar cube dose, 72 blotter paper doses, or 445 gelatin capsule doses. *See Chapman*, 500 U.S. at 458 n.2.

than upon the type of medium that happens to be involved. By setting a weight figure eight times higher than the pure drug, the amendment remains true to *Chapman* by sufficiently recognizing retail realities and adequately punishing retail traffickers.

C.

The Sentencing Commission also intended for Amendment 488 to correct the pre-amendment situation wherein LSD sentences were disproportionate to those sentences imposed for other, more dangerous substances, such as phencyclidine ("PCP").

> [T]he weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances . . .

U.S.S.G. § 2D1.1, comment. (backg'd) (1993) (as amended by Amendment 488).

IV.

After Amendment 488 was sent to Congress for review, it took effect without modification or delay, and thus with congressional approval, on November 1, 1993. Such a refinement of the sentencing scheme through the action of the Commission, with the knowledge and consent of Congress, is an expected

and necessary element of the process contemplated by the present sentencing system. As the Supreme Court has noted, "in charging the Commission 'periodically [to] review and revise' the Guidelines, Congress necessarily contemplated that the Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might suggest." *Braxton v. United States*, 500 U.S. 344, 348 (1991) (quoting 28 U.S.C. § 994(*o*)). The Commission performed its congressionally delegated role by amending § 2D1.1 in light of *Chapman*. Congress did not challenge the revision. We should not assume that Congress has made conflicting policy decisions regarding LSD weight in the areas of mandatory minimum and Guideline sentencing when those decisions may be so easily harmonized. "The judiciary has an obligation to presume that those who sit in the Congress intend that the country be governed by a sentencing system that, although composed of both mandatory minimum sentences and the guideline ranges, operates as an integrated and fair system of criminal justice." *Neal*, 46 F.3d at 1411 (Ripple, J., dissenting).

Those Circuits which reached the opposite result on this issue did so, in our view, after misinterpreting the statement in the amended background commentary that "[n]onetheless, this approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence." *See, e.g.*, *Neal*, 46 F.3d at 1408-09; *Pardue*, 36 F.3d at 431; *Boot*, 25 F.3d at 55. As we have endeavored to demonstrate, there is much more to Amendment 488 than this single sentence. Read as a whole, the amended background commentary demonstrates the intent of the Sentencing Commission to

lessen the "undue influence" that different carrier weights have on the offense level and to harmonize offense levels for different controlled substances while taking into account *Chapman*'s interpretation of the term "mixture or substance."

The Commission intended to leave *Chapman* intact—through the amendment, the Commission merely intended to standardize the amount of carrier medium that can be viewed as "mixed" with LSD. As discussed in the amended background commentary, the Commission selected a weight value eight times the actual weight of the pure LSD in an express effort to recognize the impact of *Chapman* on weight calculation. The conclusion reached by the other Circuits results in a dual system of calculating LSD weight—one rule for calculations under the Sentencing Guidelines and another rule for the mandatory minimum statutes. We decline to find that the Commission, whose mission it is to promote uniformity and fairness in sentencing, effectuated such a nonuniform and unfair result.

V.

By giving effect to Amendment 488 as written, we advance the basic objectives Congress sought to achieve in providing for the development of the Sentencing Guidelines, namely the creation of an effective, fair, and uniform sentencing system. The United States Probation Office recalculated the weight of Muschik's LSD utilizing the standard set forth in the amendment and arrived at a total of 5.68 grams. As this revised figure is more than one gram but less than ten grams, Muschik's mandatory minimum sentence will drop to ten years under 21 U.S.C. § 841(b)(1)(B) when coupled with Muschik's prior state felony drug conviction.

We have also considered the other arguments advanced by appellant and found them to be without merit.

VI.

CONCLUSION

For the reasons set forth above, we VACATE the sentence imposed by the district court and REMAND for resentencing in accordance with this opinion.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 92-30233

D.C. Nos. CR 91-072-01-CCL, CR-91-040-01-CCL

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICHARD LEE MUSCHIK, DEFENDANT-APPELLANT

[FILED June 11, 1993]

MEMORANDUM*

Appeal from the United States District Court for the District of Montana

Argued and Submitted June 7, 1993 Seattle, Washington

Before: WRIGHT, FARRIS, and D.W. NELSON, Circuit JUDGES.

Muschik appeals his convictions for escape from federal custody, 18 U.S.C. § 751, and conspiracy to distribute LSD, 21 U.S.C. §§ 841(a)(1) and 846 and his 20-year mandatory minimum sentence, 21 U.S.C. § 841(b)(1)(A). We affirm his convictions but vacate

* This disposition is not appropropriate for publication and may not be cited to or by the courts of this circuit except as provided by the Ninth Circuit Rule 36-3.

his sentence and remand to the district court for strict compliance with 21 U.S.C. § 851(b)'s inquire and inform provisions.

I

Muschik raises numerous issues in this consolidated appeal. In his drug case, he argues that (1) his counsel was ineffective, (2) the court erred in denying his motions to sever and to withdraw his plea, (3) the government and the court did not comply with sentence enhancement procedures under 21 U.S.C. § 851 and (4) a 20-year sentence is cruel and unusual punishment. In his escape case, he asserts that the court erred in denying his motion to exclude evidence about his pending drug charges and admitting evidence of his prior convictions.

II

A. *Drug Appeal*

1. *Ineffective Assistance of Counsel*

Generally, we do not address ineffective assistance claims on direct appeal. *United States v. Laughlin*, 933 F.2d 786, 788 (9th Cir. 1991). We will do so only when the record is developed sufficiently to permit the issue's resolution or where representation is so inadequate that it obviously interferes with a defendant's Sixth Amendment rights. *United States v. Daly*, 974 F.2d 1215, 1218 (9th Cir. 1992) (per curiam). This is not one of those rare cases. We decline to address this issue.

2. *Denial of Motion to Withdraw Guilty Plea*

A defendant has no "right" to withdraw a guilty plea and bears the burden of showing a fair and just reason for withdrawal. *United States v. Rios-Ortiz*, 830 F.2d 1067, 1069 (9th Cir. 1987). We review for an

abuse of discretion the district court's denial of Muschik's motion to withdraw his guilty plea. *See United States v. Oliveros-Orosco*, 942 F.2d 644, 645 (9th Cir. 1991).

Muschik made two withdrawal motions, one through his appointed counsel, the other pro se. The court did not abuse its discretion in denying either motion. As to the first, it found that the plea agreement did not require a second interview. It also concluded that Muschik's promise to identify 100 drug dealers if allowed out of prison to work as an informant did not constitute substantial assistance. As to the second motion, the court found that Muschik's claims were directly contrary to statements he had made under oath at his change of plea hearing and that he did not challenge the adequacy of the hearing, but simply ignored it. The court concluded correctly that the hearing was adequate and Muschik's plea voluntary. It also found properly that the alleged omissions of his attorney occurred after his plea change.

3. *Motion to Sever*

Because Muschik's plea was unconditional and made knowingly and voluntarily, he has waived any claims of constitutional violations occurring before entry of his plea. *See United States v. Cortez*, 973 F.2d 764, 766-68 (9th Cir. 1992).

4. *Failure to Give Proper Notice and to Comply with 21 U.S.C. § 851(b)*

If the government files an information seeking enhanced punishment based on a prior conviction, the court

> shall after conviction but before pronouncement of sentence *inquire* of the [defendant] whether he

> affirms or denies that he has been previously convicted as alleged in the information, and shall *inform* him that any challenge to a prior conviction which is not made before sentence is imposed may not thereafter be raised to attack the sentence.

21 U.S.C. § 851(b) (emphasis added). Congress enacted § 851 to fulfill the due process requirement that "a defendant receive reasonable notice and an opportunity to be heard regarding the possibility of an enhanced sentence for recidivism." *United States v. Belanger*, 970 F.2d 416, 418 (7th Cir. 1992). "[F]ailure to comply with Section 851(b) renders the sentence illegal." *United States v. Garrett*, 565 F.2d 1065, 1072 (9th Cir. 1977), *cert. denied*, 435 U.S. 974 (1978).

The government relies on *United States v. Garcia*, 954 F.2d 273 (5th Cir. 1992) and argues that substantial compliance with § 851(b)'s inquire and inform requirements should suffice.[1] In that case, the court did not inform Garcia of the proper timing of a challenge to his prior convictions. 954 F.2d at 276-77. It did, however, question him about his priors and received his admission that they were his. *Id.* at 277. Here, the government recognizes that the court did not fulfill either § 851(b)'s inquire or inform requirement. *Garcia* itself stresses that where "there was a 'complete failure to comply with § 851(b)' . . . remand[]

---

[1] The government argues that Muschik's signing of the plea agreement, his acknowledgment at the change of plea hearing that he faced a minimum 20-year sentence, his admission of the conviction during cross-examination in his escape trial, his attorney's acknowledgment at sentencing that Muschik faced an enhanced sentence and his failure to comply with the notice provisions of § 851(c) constitute substantial compliance.

for resentencing 'in full compliance with the procedures of the enhancement statute'" is required. *Id.* We must vacate Muschik's sentence and remand for strict compliance with § 851(b).[2]

5. *Cruel and Unusual Punishment*

Although the argument has been made in similar cases without success, we need not reach it since we vacate the sentence.

B. *Escape Appeal*

1. *Denial of Motion in Limine to Exclude Evidence of Underlying Charge*

Federal Rule of Evidence 403 allows a court to exclude relevant evidence if its probative value is substantially outweighed by unfair prejudice. We review for an abuse of discretion the district court's balancing of probative value versus unfair prejudice. *United States v. Layton*, 767 F.2d 549, 553 (9th Cir. 1985).

The court did not err. Evidence regarding the underlying charge was probative of Muschik's possible motive for escaping. The potential of a 20-year mandatory minimum sentence could provide strong incentive to escape. As the court observed, the nature of the charges would have been admitted anyway when Muschik testified about the United States Marshal's drug dealer statement. Muschik would have no reason to fear the Marshal who made the statement had Muschik not been facing drug charges.

The admission of the evidence may have prejudiced him by focusing the jury on the underlying drug

---

[2] Because we vacate Muschik's sentence we need not address his argument that the government did not comply with § 851(a)(1). If an error exists, we assume that it is a clerical one, which can be corrected. *See* 21 U.S.C. § 851(a)(1).

crime. The danger of unfair prejudice, however, did not substantially outweigh the evidence's probative value. The court instructed the jury that any evidence of other crimes was to be considered only to the extent that it related to the defendant's intent. The court also did not err in reasoning that the jury was entitled to know the type of drug to prevent it from making incorrect, and possibly prejudicial, conclusions.

2. *Admission of Prior Crimes*

Although possibly prejudicial, the admission of this evidence was harmless error. *United States v. Lui*, 941 F.2d 844, 848 (9th Cir. 1991). The remaining evidence overwhelmingly demonstrated Muschik's guilt.

Muschik admitted that he was in federal custody at the time of his escape. The government introduced evidence that DEA agents lawfully arrested him and that he did not have permission to leave. He testified that the Lake County jailers told him that he should leave the jail and that they assisted in his escape. He also testified, however, that he and three other inmates grabbed the jailer on duty, handcuffed him, took his keys and escaped. Those are not the actions of someone who has permission to leave.

The evidence of his prior crimes was also harmless as to Muschik's duress defense. He did not show an immediate threat or that he surrendered to the proper authorities after attaining a position of safety. *See United States v. Beltran-Rios*, 878 F.2d 1208, 1213-14 (9th Cir. 1989).

AFFIRMED in part, VACATED in part and REMANDED.

APPENDIX C

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA MISSOULA DIVISION

Nos. CR 91-40-M-CCL, CR 91-72-M-CCL

UNITED STATES OF AMERICA, PLAINTIFF

v.

RICHARD LEE MUSCHIK, DEFENDANT

[Entered Dec. 6, 1993]

JUDGMENT

Defendant Richard Lee Muschik having been found guilty of escape in violation of 18 U.S.C. §751 and having pleaded guilty to Count One of a five count indictment charging him in Count One with conspiracy to distribute a controlled substance in violation of 21 U.S.C. §846, and having appeared before the court for sentencing on December 2, 1993,

IT IS THE JUDGMENT OF THE COURT, pursuant to the Sentencing Reform Act of 1984 and 21 U.S.C. §841(b)(1)(A), that Richard Lee Muschik is hereby committed to the custody of the Bureau of Prisons for a term of two hundred forty (240) months.

Upon release from incarceration, the defendant shall be placed on supervised release for a term of ten (10) years. Within 72 hours of release from the custody of the Bureau of Prisons, the defendant shall

report in person to the probation office in the district to which the defendant is released.

While on supervised release, the defendant shall not commit another federal, state, or local crime, shall not illegally possess a controlled substance, shall not own or possess a firearm or other dangerous weapon, shall comply with the standard conditions that have been adopted by this court, and are attached hereto, and shall comply with the following additional conditions:

1. Defendant shall provide access to any financial information requested by the United States Probation Office;

2. Defendant shall participate in a program approved by the United States Probation Office for substance abuse, which may include testing to determine if the defendant has reverted to the use of drugs or alcohol;

3. Defendant shall participate in a mental health counseling program as directed by the United States Probation Office; and

4. Defendant shall submit to a search of his person, residence, and/or vehicle at the request of the United States Probation Office.

IT IS FURTHER ORDERED that the defendant shall pay to the United States a special assessment of $100, which shall be due immediately.

Done and dated this 6 day of December, 1993.

/s/ Charles C. Lovell
CHARLES C. LOVELL
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA HELENA DIVISION

Criminal Docket No.

No. 91-40-M-CCL; No. 91-72-M-CCL

UNITED STATES OF AMERICA, PLAINTIFF

vs.

RICHARD LEE MUSCHIK, DEFENDANT

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE CHARLES C. LOVELL
UNITED STATES DISTRICT JUDGE

Taken at:
UNITED STATES COURTHOUSE
301 SOUTH PARK
HELENA, MONTANA 59601
DECEMBER 2, 1993

[18]

* * * * *

THE COURT: Very well.

Mr. Muschik, do you have anything further that you would like to say?

THE DEFENDANT: No, your Honor.

THE COURT: Are you ready for the Court to impose sentence?

THE DEFENDANT: Yes, I am.

THE COURT: And Mr. Brooke, is there any reason, legal or otherwise, why sentence ought not be imposed?

MR. BROOKE: No, your Honor.

THE COURT: The issue before the Court at this point is simply, it seemed to me whether this Court is obligated to follow the ruling of the United States Supreme Court in the Chapman case and whether the Court is obligated to enforce what Congress has enacted as a mandatory minimum sentence. And I think the answer to that is that it's the duty of the Court to follow those authorities in this case, under these particular facts.

I stated before that I think the sentence imposed was a little bit longer sentence of incarceration than this Court would have imposed without the mandatory minimum. [19] And that remains the case today. But I think the Court is compelled to follow the authority that Congress has laid down and that the Supreme Court of the United States has laid down.

And accordingly, it's the judgment of the Court that the defendant is hereby remanded to the custody of the Attorney General for a term of 20 years. And upon release from imprisonment, the defendant will be placed on supervised release for a term of ten years.

* * * * *

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 93-30461

D.C. No. CR 91-00072-CCL

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICHARD LEE MUSCHIK, DEFENDANT-APPELLANT

Appeal from the United States District Court
for the District of Montana

[Filed May 1, 1995]

ORDER

Before: WOOD,* HUG, and TANG, Circuit Judges.

The panel, as constituted in the above case, has voted to deny appellee's petition for rehearing. Judge Hug has voted to reject the suggestion for rehearing en banc, and Judges Wood and Tang have recommended rejection of the suggestion for rehearing en banc.

---

* Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

The full court has been advised of the en banc suggestion and no active judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX F

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93-30461
CT/AG#: CR-91-00072-CCL
CT/AG#: CR-91-00072-CCL

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

RICHARD LEE MUSCHIK, DEFENDANT-APPELLANT

Appeal From the United States District Court for the District of Montana (Missoula).

[FILED May 12, 1995]
[Mandate Issued May 9, 1995]

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Montana (Missoula) and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and hereby is VACATED and REMANDED for resentencing.

Filed and entered February 28, 1995

Supreme Court, U.S.
FILED
OCT 19 1995
CLERK

No. 95-156

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

RICHARD LEE MUSCHIK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

WILLIAM M. BROOKE
Counsel of Record
MOORE, O'CONNELL & REFLING
Attorneys for Respondent
601 Haggerty Lane, Suite 10
P.O. Box 1288
Bozeman, Montana 59771-1288
(406) 587-5511

7622
Lutz Appellate Services, Inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED

Whether the weight assigned to a dosage unit of LSD by the Sentencing Commission for purposes of calculating a defendant's offense level under Sentencing Guidelines § 2D1.1 also governs the determination of the weight of the "mixture or substance" containing LSD for purposes of applying the mandatory minimum sentencing provisions of 21 U.S.C. § 841(b), where the Sentencing Guideline provision is based on the use of the terms "mixture or substance" found in 21 U.S.C. § 841(b) and there is an absence of legislative history or congressional intent to suggest that different weights for the same dosage unit of LSD should be used for Sentencing Guideline purposes than for mandatory minimum considerations under the statute.

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No. 95-156

In The

Supreme Court of the United States

October Term, 1995

UNITED STATES OF AMERICA,

Petitioner,

vs.

RICHARD LEE MUSCHIK,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT'S BRIEF IN OPPOSITION

A three judge panel of the United States Court of Appeals for the Ninth Circuit reversed the District Court's judgment of sentence which imposed a 20-year mandatory minimum sentence on Respondent Richard Lee Muschik. Petitioner United States moved for a rehearing *en banc* which motion was denied. Thereafter, the United States filed a Petition for Writ of Certiorari to the Supreme Court for review of the Ninth Circuit decision.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-15a) is reported at 49 F.3d 512. Denial of the United States' petition for hearing with suggestion for rehearing was entered May 1, 1995. (App., *infra*, 20a)

STATEMENT OF JURISDICTION

This petition is not properly before the Court as represented by Petitioner United States. Pursuant to Rule 13.1 of the Supreme Court Rules, a petition for a writ of certiorari to review a civil or criminal judgment entered by a United States Court of Appeals is deemed to be timely filed if filed within 90 days after entry of judgment. If a petition for rehearing is timely filed in the lower court, the petition runs from the date of the denial of the petition for hearing. Supreme Court Rule 13.4. However, "a suggestion made to a United States Court of Appeals for a rehearing *en banc* pursuant to Rule 35(b), F.R.A.P. is not a petition for rehearing within the meaning of this [Rule 13.4] Rule." Supreme Court Rule 13.4. Here, Petitioner United States filed its petition for writ of certiorari outside the time allowed by Rules 13.1 and 13.4. The Ninth Circuit Court of Appeals issued its judgment in this matter on February 28, 1995. App. 1a. The United States filed its petition for rehearing with suggestion for rehearing *en banc* on April 11, 1995. App. 16a-19a. The Ninth Circuit denied the United States petition May 12, 1995. App. 20a.

While the United States' petition for writ of certiorari to this Court would be timely filed if the United States had petitioned the Court of Appeals for a rehearing, that is not the case. Rather, the United States petitioned the Ninth Circuit for a rehearing *with suggestion for rehearing en banc pursuant to Rule 35(b),* F.R.A.P. instead of Rule 40. App. 16a-17a. (emphasis added.) Therefore, the United States failed to toll the time for filing its

petition for writ of certiorari with this Court under Rule 13.4 and the time to file the writ expired 90 days from February 28, 1995 which is May 29, 1995.

STATEMENT OF THE CASE

The Drug Enforcement Agency arrested Respondent Richard Muschik on May 24, 1991 pursuant to a complaint charging him with conspiracy to possess with intent to distribute and actual distribution of LSD in violation of 21 U.S.C. § 841(a)(1) and § 846 (App. 5a).

Respondent ultimately plead guilty to Count I of a five count indictment charging conspiracy to distribute LSD pursuant to 21 U.S.C. § 846. *Id.* The District Court sentenced Respondent on May 26, 1992 to a term of twenty years imprisonment after determining that Respondent's prior state conviction for a drug related charge, together with the amount of LSD involved which the presentence report calculated as 101 grams, required application of the mandatory minimum provisions of 21 U.S.C. § 841(b)(1)(A). *Id.* Respondent timely appealed to the Ninth Circuit the convictions and sentence.

The Ninth Circuit affirmed the convictions against the Respondent for conspiracy to distribute LSD in violation of 21 U.S.C. §§ 846 and 841(a)(1), but vacated in its entirety the District Court's sentence and remanded the case for resentencing in strict compliance with 21 U.S.C. § 851(b) inquire and inform provisions. *United States v. Muschik*, No. 92-30233 (9th Cir. June 11, 1993).

Prior to the District Court's resentencing hearing pursuant to the Ninth Circuit remand, the United States Sentencing Commission amended the Sentencing Guidelines to correct the way in which sentences involving LSD were calculated. *United*

States Sentencing Guidelines Manual, App. C, Amendment 488 (1993). The new amendments to the Guidelines rejected the former process of including the entire weight of the carrier medium in determining the weight of LSD and instead assigned a weight of 0.4 milligrams per dosage unit of LSD. *Id.* § 2D1.1(c). Under the prior method of calculation, it was determined that Respondent Muschik possessed 101 grams of LSD because the entire weight of the blotter paper was included. *Id.*

Respondent argued that the amended Sentencing Guideline revisions should apply and on October 22, 1993, the District Court agreed to consider the revisions and ordered a new presentence report prepared which recalculated the weight of the LSD under the amended Guidelines as 5.68 grams rather than 101 grams. *Id.*

On November 23, 1993, the court held the sentencing hearing and resentenced Respondent to exactly the same sentence that the District Court previously had entered on May 26, 1992, and did so with the recognition that such a sentence was overly harsh but that the court was without an option in light of the ruling in *Chapman v. United States*, 500 U.S. 453 (1991). App. 23a. The sentence entered by the District Court on May 26, 1992, and again on November 5, 1993, commits the forty-four year old Respondent Richard Lee Muschik to prison for a period of 20 years pursuant to the mandatory minimum provisions of 21 U.S.C. § 841(b)(1)(A). Thereafter, Respondent timely appealed the District Court's sentence.

The Ninth Circuit reversed again the District Court's Judgment of Sentence and found that at the time *Chapman* was decided, neither the Sentencing Guidelines nor § 841(b)(1) defined the words "mixture" or "substance." *United States v. Muschik.* App. 8a. Importantly, the Ninth Circuit observed that at the time *Chapman* was decided, this Court was presented with

only two choices, utilizing the negligible weight of the pure LSD, or utilizing the gross weight of the pure LSD, together with its carrier medium. The Ninth Circuit found that faced with these two choices, this Court could only choose the gross weight in keeping with the market orientated approach adopted by Congress and the Guidelines. *Id.* at 9a. The Ninth Circuit found that Amendment 488 (now § 2D1.1(c)) of the United States Sentencing Guidelines presents a third option, namely, the court may utilize and assign a rational weight of LSD for the calculation of sentences. *Id.* The Ninth Circuit found that this third option did not disturb or conflict with the holding of *Chapman* but was consistent with *Chapman's* holding "to include the weight of the carrier medium for the sentencing purposes since that medium facilitates the transportation, storage, concealment, and sale of the drug." *Id.* The Ninth Circuit further held that "[T]he frame work of *Chapman* thus remains intact while the theoretical foundation upon which it sits is strengthened" by using the Sentencing Guidelines method of assigning a rationale weight to a dosage unit of LSD. *Id.* at 11a.

The Ninth Circuit also found that the newly adopted Amendment No. 488 left intact one of the fundamental rationales behind *Chapman, i.e.*, the maintenance of a "market oriented" approach to drug sentencing. *Id.* at 11a. By utilizing the rational method set forth in § 2D1.1(c) of the Guidelines, Muschik's sentence would still be based on the number of dosages sold rather than the type of medium that happens to be involved. The Ninth Circuit held that it is a rational and fair system to assign some weight to the carrier medium unlike the Petitioner in *Chapman* who sought to assign no weight to the carrier medium. In *Muschik,* the Court of Appeals found that assignment of a weight 8 times higher than the pure drug sufficiently recognizes and punishes retail drug traffickers. *Id.* at 10a.

The Ninth Circuit also found that its holding was consistent

with the Sentencing Commission's intent to correct the pre-amendment situation where LSD sentences were significantly disproportionate to sentences imposed for other more dangerous substances. *Id.* Finally, the Court of Appeals also observed that while Congress had the opportunity to challenge the refinement and revision of punishment for drug offenses involving LSD based upon the weight of the actual LSD together with some weight of the carrier medium, Congress chose to remain silent on Amendment 488 making it incorrect to assume that Congress had made conflicting policy decisions regarding LSD weight in the areas of mandatory minimum and guideline sentencing when such decisions can be readily harmonized. *Id.* at 13a.

REASONS FOR DENYING THE WRIT

The United States has failed to file timely its petition for writ of certiorari to this Court and the petition should therefore be denied. Even assuming the petition is timely, the United States Court of Appeals for the Ninth Circuit has correctly decided the issue of whether to use different drug weights for the same dosage units of LSD. The Court's decision is *Muschik* provides for a rational, fair, and uniform sentencing system that is consistent with the Supreme Court's holding in *Chapman.*

The Petitioner United States only apparent reason for requesting the petition is that the government disagrees with the decision in *United States v. Muschik,* which is contrary to the Seventh Circuit holding in *Neal v. United States, cert. granted,* No. 94-9088 (June 19, 1995). While a conflict within the Circuits is a basis for granting the government's petition for certiorari, it need not be the controlling factor in the exercise of the Court's decision. Rule 10, Supreme Court Rules. Even assuming this Court desires to resolve such a conflict, the Court can do so by summarily denying the United States' petition in this case and deciding *Neal v. United States* in accordance with the denial of certiorari for this matter.

If the Court determines that the United States petition for certiorari should be granted, notwithstanding the untimely filing of the petition, then the Court should grant only in part the United States petition. The United States has requested that the Court hold the petition in this case and dispose of it in light of the decision in *Neal* rather than allowing Muschik the opportunity to brief and argue his case. Brief for Petitioner at p. 8. Petitioner desires to have the Court review the question presented by *Muschik* and *Neal* based upon the Circuit decision most favorable to the United States' position against an apparently *pro se* defendant.

In addition the case in *Neal v. United States* is different from *United States v. Muschik*. In *Neal*, the defendant received at least some benefit in a reduced sentence because the Sentencing Guidelines amendment reduced the amount of weight of LSD. *Neal* was originally sentenced to 192 months of imprisonment. After his pro se motion to reduce his sentence because of the intervening amendment to the Sentencing Guidelines, the District Court reduced his sentence from 192 months to 120 months. In *Muschik*, however, Respondent Muschik received no benefit from the intervening amendment, even though the gross weight of LSD was 101 grams under the prior Guidelines and 5.68 grams under the revised Guidelines. Muschik received a sentence of 240 months the exact sentence he had received prior to the amendment to the Sentencing Guidelines. Presumably, the United States will argue that applying two different weights for the same drug is not irrational or unfair because *Neal* received at least some benefit from this dual system, unlike Respondent Muschik. In the event that the petition is granted in *United States v. Muschik*, the Court should join *Muschik* and *Neal* to consider them concurrently, thereby providing all parties an opportunity to argue their respective positions to this Court.

CONCLUSION

The petition for writ of certiorari should be denied and in the event it is granted, the United States petition should be modified to allow the Court to consider *United States v. Muschik* and *Neal v. United States* together rather than holding the petition in *Muschik* pending a decision in *Neal.*

Dated: October, 19, 1995

Respectfully submitted,

WILLIAM M. BROOKE
Counsel of Record
MOORE, O'CONNELL & REFLING
Attorneys for Respondent
P.O. Box 1288
Bozeman, MT 59771-1288
(406) 587-5511

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED FEBRUARY 28, 1995

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 93-30461

D. C. No. CR 91-00072-CCL

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v.

RICHARD LEE MUSCSK,

Defendant-Appellant.

OPINION

Appeal from the United States District Court for the District of Montana

Charles C. Lovell, District Judge, Presiding

Argued and Submitted
October 3, 1994 — Seattle, Washington

Filed February 28, 1995

Appendix A

Before: Harlington Wood, Jr.,* Procter Hug, Jr., and Thomas Tang, Circuit Judges.

Opinion by Judge Wood

* * *

COUNSEL

William M. Brooke, Moore, O'Connell & Refling, Bozeman, Montana, for the defendant-appellant.

Kris A. McLean, Assistant United States Attorney, Helena, Montana, for the plaintiff-appellee.

OPINION

WOOD, Jr., Circuit Judge:

Following the Ninth Circuit's remand, Richard Lee Muschik was resentenced on December 6, 1993, to a prison term of twenty years pursuant to the mandatory minimum sentence set forth in 21 U.S.C. § 841(b)(1)(A). Muschik had been earlier found guilty of escape in violation of 18 U.S.C. § 751 and pleaded guilty to conspiracy to distribute lysergic acid diethylamide ("LSD") in violation of 21 U.S.C. §§ 841(a)(1) and 84[illegible]. In his appeal, Muschik argues that the district court erroneously concluded that ten grams or more of LSD were involved in this case. Muschik contends that the entire weight of the carrier medium should not be included when the weight of LSD is calculated. Instead,

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* The Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit, is presiding by designation

Appendix A

Muschik argues that the formula set forth in the November 1, 1993 amendment to U.S.S.G. § 2D1.1(c) should be used to determine the net weight of LSD involved for sentencing purposes. For the reasons given below, we vacate the sentence imposed by the district court and remand for resentencing in accordance with this opinion.

I.

BACKGROUND

Richard Lee Muschik was arrested on May 24, 1991, by the Drug Enforcement Administration ("DEA") pursuant to a Complaint charging him with conspiracy to possess with intent to distribute and actual distribution of LSD in violation of 21 U.S.C. §§ 841(a)(1) and 846. On October 23, 1991, Muschik escaped from federal custody while awaiting trial on the drug charges. Muschik was apprehended again on November 28, 1991, and detained. On January 28, 1992, Muschik was convicted of escape in violation of 18 U.S.C. § 751.

On March 12, 1992, Muschik pleaded guilty to conspiracy to distribute LSD in violation of 18 U.S.C. §§ 841(a)(1) and 846. On May 26, 1992, the district court combined the escape and drug charges for sentencing and then determined that the amount of LSD involved required application of the mandatory minimum provision of 21 U.S.C. § 841(b)(1)(A). Pursuant to this statute, and in light of Muschik's prior state felony drug conviction, Muschik was sentenced to a term of twenty years.

Muschik appealed these convictions and the sentence. We affirmed the escape and drug convictions, but vacated the district court's sentence and remanded for resentencing in strict

compliance with the inquire and inform provisions of 21 U.S.C. § 851(b) regarding the enhancement of Muschik's sentence for recidivism. *United States v. Muschik*, No. 92-30233 (June 11, 1993).

Prior to the district court's resentencing, the U.S. Sentencing Commission amended the Sentencing Guidelines and changed the manner in which the weight of LSD is calculated for sentencing purposes. U.S.S.G. § 2D1.1(c) (1993) (as amended by U.S.S.G. app. C, amend. 488 (1993)) ("Amendment 488"). Under the prior method, which includes the entire weight of the carrier medium, it was determined that Muschik possessed 101 grams of LSD. In preparation for resentencing, the United States Probation Office recalculated the weight of this LSD under the amended guidelines, which establish a standard weight of 0.4 milligram per dosage of LSD, and arrived at a weight of 5.68 grams.

On December 6, 1993, the district court nevertheless resentenced Muschik to a term of twenty years a term of the same length as it had imposed originally. Muschik appeals.

II.

ANALYSIS

We review the district court's interpretation and application of the Sentencing Guidelines *de novo*. *United States v. Conkins*, 987 F.2d 564, 571 (9th Cir. 1993). The district court's other legal determinations in this regard are also reviewed *de novo*. *United States v. Anderson*, 895 F.2d 641, 644 (9th Cir. 1990). To the extent that the district court has made any factual determinations, the clearly erroneous standard applies. *Id.*

Appendix A

A.

Title 21 U.S.C. § 841(b)(1)(A)(v) imposes a mandatory minimum sentence of ten years imprisonment for a violation of § 841(a)[1] where there is involved "10 grams or more of a mixture or substance containing a detectable amount" of LSD. Section 841(b)(1)(B)(v) imposes a mandatory minimum sentence of five years imprisonment where there is involved "1 gram or more of a mixture or substance containing a detectable amount of LSD. Both sections provide for a doubling of the mandatory minimum sentence where the defendant has one or more prior felony drug convictions. Thus, it is obvious that properly determining the weight of LSD involved in a given case is of paramount importance for sentencing purposes.

The calculation of LSD weight is difficult, however, because the quantity of the actual drug present in each dose is infinitesimal — the DEA assigns a standard weight for LSD of only 0.05 milligram per dosage unit. To facilitate transportation,

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1. In relevant part, § 841(a) provides:

"(a) Except as authorized by this subchapter, it shall be unlawful for any person knowingly or intentionally —

> (1) to manufacture, distribute, or dispense, or possess with intent to manufacture, distribute, or dispense, a controlled substance. . . ."

Muschik actually pleaded guilty lo conspiracy to distribute LSD in violation of 21 U.S.C. § 846, but that section states: "Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

distribution and use of LSD, it is commonly dissolved in solvent and then spread upon a medium — usually blotter paper, gelatin, or a sugar cube. This inactive carrier medium typically far outweighs the LSD itself; thus, there exists the potential for wide variances in sentencing based upon nothing more than the happenstance weight of the particular carrier chosen by a given defendant.

In *Chapman v. United States*, 500 U.S. 453, 468 (1991), the Supreme Court held that the term "mixture or substance" present in 21 U.S.C. § 841(b)(1) includes the entire weight of the carrier medium.[2] The district court relied upon *Chapman* to calculate the weight of LSD involved in this case. With the entire weight of the carrier medium thus included, the amount of LSD involved was determined to be 101 grams well over the ten gram benchmark required for the imposition of the ten year mandatory minimum sentence established by 21 U.S.C. § 841(b)(1)(A). In light of Muschik's prior state felony drug conviction, the district court followed § 841(b)(1)(A) and doubled the mandatory minimum sentence to twenty years.

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2. The *Chapman* Court answered concerns of possible unfairness that may result where variations in the weight of the inert carrier medium cause otherwise similarly situated defendants to receive different sentences by stating:

> Although LSD is not sold by weight, but by dose, and a carrier medium is not, strictly speaking, used to "dilute" the drug, that medium is used to facilitate the distribution of the drug. Blotter paper makes LSD easier to transport, store, conceal, and sell. It is a tool of the trade for those who traffic in the drug, and therefore it was rational for Congress to set penalties based on this chosen tool.

Chapman, 500 U.S. at 466.

Appendix A

B.

Muschik does not contest the holding of *Chapman* directly, but instead contends that the November 1, 1993 amendment to § 2D1.1(c) of the Sentencing Guidelines compels a recalculation of the weight of the LSD as the amendment postdates both the *Chapman* decision and the Ninth Circuit's remand for resentencing. Since there is no *ex post facto* clause problem involved here, as Muschik is certainly not disadvantaged by the amendment, the Guidelines that are in effect upon Muschik's resentencing must be applied. *United States v. Fagan*, 996 F.2d 1009, 1018 (9th Cir. 1993). The question presented here concerns the actual nature of the changes wrought by the amendment to § 2D1.1(c) and the relation of that amendment to *Chapman* and the mandatory minimum statutes.

III.

We begin by noting that this precise issue has already been addressed, with differing results, by several other circuits. We find the reasoning of the Eighth Circuit as expressed in *United States v. Stoneking*, 34 F.3d 651 (1994), a late case not cited to us by the parties, persuasive and herein adopt it for our own.[3] Nor did the district court have the benefit of this late case. We reject the contrary result reached by the Seventh, Fifth, Tenth and First Circuits. *See United States v. Neal*, No. 94-1773 (7th Cir. Feb. 2, 1995) (en banc); *United States v. Pardue*, 36 F.3d 429 (5th Cir. 1994); *United States v. Mueller*, 27 F.3d 494 (10th Cir. 1994); *United States v. Boor*, 25 F.3d 52 (1st Cir. 1994).

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3. The Eighth Circuit subsequently vacated the *Stoneking* opinion and granted an *en banc* rehearing. As of the date of our decision in this case, the *en banc Stoneking* opinion has not yet been issued. Regardless of the Eighth Circuit's eventual decision in this case, we remain impressed by the reasoning expressed in the original opinion.

Appendix A

A.

As an initial matter, it is clear that where a statute and a Guideline conflict, the statute controls.[4] Therefore, to grant full effect to Amendment 488, we must find that the amendment does not conflict with the mandatory minimum provisions at issue here. Our review of the amendment, the relevant provisions of the statute, and the policy considerations behind each leads us to conclude that Amendment 488 and the statute do not conflict.

As discussed above, the Supreme Court in *Chapman* held that the term" mixture or substance" found in 21 U.S.C. § 841(b)(1) "requires the weight of the carrier medium to be included when determining the appropriate sentence for trafficking in LSD." *Chapman*, 500 U.S. at 468. At the time *Chapman* was decided, however, neither the Sentencing Guidelines nor § 841(b)(1) defined the words "mixture" or "substance." Therefore, the Supreme Court utilized dictionary-supplied definitions.[5] The Supreme Court determined

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4. *See, e.g.*, U.S.S.G. § 5G1.1(b) (1993) ("Where a statutorily required minimum sentence is greater than the maximum of the applicable guideline range, the statutorily required minimum sentence shall be the guideline sentence.").

5. The Supreme Court found:

> A "mixture" is defined to include "a portion of matter consisting of two or more components that do not bear a fixed proportion to one another and that however thoroughly commingled are regarded as retaining a separate existence." . . . A "mixture" may also consist of two substances blended together so that the particles of one are diffused among the panicles of the other.

Id. at 462 (citations omitted).

that blotter paper fell within its definition of "mixture or substance" because "[t]he LSD crystals are inside of the paper; so that they are commingled with it, but the LSD does not chemically combine with the paper. Thus, it retains a separate existence . . . The LSD is diffused among the fibers of the paper." *Id.* at 462.

One important factor behind the *Chapman* decision was that the Supreme Court was there presented with only two choices: utilize the negligible net weight of the pure LSD or utilize the gross weight of the pure LSD together with its carrier medium. "Faced with that choice, the Court could only choose the gross weight, in keeping with the fact that the weights of other drugs include dilutants and cutting agents, and in keeping with the market-oriented approach adopted by the Guidelines." *Stoneking*, 34 F.3d at 654; *see also Neal*, No. 961773, slip op. at 21-22 (Ripple, J., dissenting). The advent of Amendment 488 presents a third option: A court may now utilize an assigned rational weight for the calculation of sentences.

It is our belief that the assignment of a uniform and rational weight to LSD on a carrier medium does not conflict with *Chapman*. In fact, the background commentary to § 2D1.1, as amended by Amendment 488, expressly states that "this approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence *(see Chapman;* § 5G1.1(b))." Rather than "overriding" *Chapman's* interpretation of "mixture or substance," the formula set forth in Amendment 488 merely standardizes the amount of carrier medium that can be properly viewed as "mixed" with the pure drug.

Chapman held that it was rational to include the weight of

the carrier medium for sentencing purposes since that medium facilitates the transportation, storage, concealment, and sale of the drug. *Chapman*, 500 U.S. at 466. Amendment 488 accounts for this facilitation by selecting a standard dosage weight eight times the actual weight of the pure LSD[6] which simultaneously eliminates the potential for undue sentencing disparities,[7] the existence of which even the *Chapman* Court acknowledged. *See Chapman*, 500 U.S. at 466. As the Eighth Circuit found,

> [b]y assigning a sentencing weight per dose that is eight times the actual weight of the pure drug, the Sentencing Commission has determined in effect, that .05 mg of LSD can be absorbed in, or chemically bonded with, a

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6. The background commentary to U.S.S.G. § 2D1.1, as amended by Amendment 488, makes clear the Sentencing Commission's intent to perpetuate the rationale behind *Chapman:*

> The dosage weight of LSD selected exceeds the [DEA]'s standard dosage unit for LSD of 0.05 milligram (i.e., the quantity of actual LSD per dose) in order to assign some weight to the carrier medium. Because LSD typically is marketed and consumed orally on a carrier medium, the inclusion of some weight attributable to the carrier medium recognizes . . . the decision in *Chapman v. United States*, [500 U.S. 453] (1991) (holding that the term "mixture or substance" in 21 U.S.C. § 841(b)(1) includes the carrier medium in which LSD is absorbed).

7. For example, before Amendment 488 took effect, a drug trafficker would receive the mandatory minimum sentence of five years for one gram or more of LSD under 21 U.S.C. § 841(b)(1)(B) by selling either 1/2 of a sugar cube dose, 72 blotter paper doses, or 445 gelatin capsule doses. *See Chapman*, 500 U.S. at 458 n.2.

> carrier eight times its weight. Thus, Amendment 488 remains true to the *Chapman* mandate that the weight of the carrier must be included if the carrier can be said to be bonded with or mixed with the drug.

Stoneking, 34 F.3d at 654 (footnote omitted). The framework of *Chapman* thus remains intact while the theoretical foundation upon which it sits is strengthened.

B.

Amendment 488 also leaves intact another concern behind the *Chapman* decision, the maintenance of a "market-oriented" approach to drug sentencing. This approach looks to "the total quantity of what is distributed, rather than the amount of pure drug involved . . . to determine the length of the sentence." *Chapman*, 500 U.S. at 461 (citation omitted). Standardizing the weight value of LSD furthers this market-oriented approach because LSD, unlike most other drugs, is not sold by weight but by dose. The price of a dose of LSD is set without any regard to the weight of carrier medium. Amendment 488 thus furthers the market-oriented approach by hinging sentencing upon the number of doses sold, rather than upon the type of medium that happens to be involved. By setting a weight figure eight times higher than the pure drug, the amendment remains true to *Chapman* by sufficiently recognizing retail realities and adequately punishing retail traffickers.

C.

The Sentencing Commission also intended for Amendment 488 to correct the pre-amendment situation wherein LSD

sentences were disproportionate to those sentences imposed for other, more dangerous substances, such as phencyclidine ("PCP").

> [T]he weight per dose selected is less than the weight per dose that would equate the offense level for LSD on a carrier medium with that for the same number of doses of PCP, a controlled substance that comparative assessments indicate is more likely to induce violent acts and ancillary crime than is LSD. (Treating LSD on a carrier medium as weighing 0.5 milligram per dose would produce offense levels equivalent to those for PCP.) Thus, the approach decided upon by the Commission will harmonize offense levels for LSD offenses with those for other controlled substances . . .

U.S.S.G. § 2D1.1, comment. (backg'd) (1993) (as amended by Amendment 488).

IV.

After Amendment 488 was sent to Congress for review, it took effect without modification or delay, and thus with congressional approval, on November 1, 1993. Such a refinement of the sentencing scheme through the action of the Commission, with the knowledge and consent of Congress, is an expected and necessary element of the process contemplated by the present sentencing system. As the Supreme Court has noted, "in charging the Commission 'periodically [to] review and revise' the Guidelines, Congress necessarily contemplated that the

Commission would periodically review the work of the courts, and would make whatever clarifying revisions to the Guidelines conflicting judicial decisions might Suggest" *Braxton v. United States*, 500 U.S. 344, 348 (1991) (quoting 28 U.S.C. § 994(o)). The Commission performed its congressionally delegated role by amending § 2D1.1 in light of *Chapman*. Congress did not challenge the revision. We should not assume that Congress has made conflicting policy decisions regarding LSD weight in the areas of mandatory minimum and Guideline sentencing when those decisions may be so easily harmonized. "The judiciary has an obligation to presume that those who sit in the Congress intend that the country be governed by a sentencing system that, although composed of both mandatory minimum sentences and the guideline ranges, operates as an integrated and fair system of criminal justice." *Neal*, 94-1773, slip. op. at 13 (Ripple, J., dissenting).

Those Circuits which reached the opposite result on this issue did so, in our view, after misinterpreting the statement in the amended background commentary that "[n]onetheless, this approach does not override the applicability of 'mixture or substance' for the purpose of applying any mandatory minimum sentence." *See, e.g., Neal*, No. 94-1773, slip op. at 7; *Pardue*, 36 F.3d at 431; *Boot*, 25 F.3d at 55. As we have endeavored to demonstrate, there is much more to Amendment 488 than this single sentence. Read as a whole, the amended background commentary demonstrates the intent of the Sentencing Commission to lessen the "undue influence" that different carrier weights have on the offense level and to harmonize offense levels for different controlled substances while taking into account *Chapman's* interpretation of the term "mixture or substance."

The Commission intended to leave *Chapman* intact —

through the amendment, the Commission merely intended to standardize the amount of carrier medium that can viewed as "mixed" with LSD. As discussed in the amended background commentary, the Commission selected a weight value eight times the actual weight of the pure LSD in an express effort to recognize the impact of *Chapman* on weight calculation. The conclusion reached by the other Circuits results in a dual system of calculating LSD weight —one rule for calculations under the Sentencing Guidelines and another rule for the mandatory minimum statutes. We decline to find that the Commission, whose mission it is to promote uniformity and fairness in sentencing, effectuated such a nonuniform and unfair result.

V.

By giving effect to Amendment 488 as written, we advance the basic objectives Congress sought to achieve in providing for the development of the Sentencing Guidelines, namely the creation of an effective, fair, and uniform sentencing system. The United States Probation Office recalculated the weight of Muschik's LSD utilizing the standard set forth in the amendment and arrived at a total of 5.68 grams. As this revised figure is more than one gram but less than ten grams, Muschik's mandatory minimum sentence will drop to ten years under 21 U.S.C. § 841(b)(1)(B) when coupled with Muschik's prior state felony drug conviction.

We have also considered the other arguments advanced by appellant and found them to be without merit.

VI.

CONCLUSION

For the reasons set forth above, we VACATE the sentence imposed by the district court and REMAND for resentencing in accordance with this opinion.

APPENDIX B — EXCERPTS OF PETITION FOR REHEARING DATED APRIL 11, 1995

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 94-30461

UNITED STATES OF AMERICA

Appellee,

v.

RICHARD LEE MUSCHIK

Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MONTANA

GOVERNMENT'S PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING EN BANC

STATEMENT OF COUNSEL

Pursuant to Fed. R. App. P. 35 and Rule 35-1 of the Rules of this Court, the United States suggests the appropriateness of rehearing en banc of the panel's decision that vacated appellant's sentence. The opinion, written by Judge Harlington Wood, Jr., of the Seventh Circuit, sitting by designation, and joined by Judges Hug and Tang, was rendered on February 28, 1995.

The panel held that the weight assigned by the Sentencing Commission to a dosage unit of lysergic acid diethylamide (LSD) for purposes of calculating a defendant's sentence under Sentencing Guidelines § 2D1.1 also governs the determination of

the weight of the "mixture or substance" containing LSD for purposes of applying the mandatory minimum sentencing provisions of 21 U.S.C. 841(b).

The panel's opinion directly conflicts with the opinions of five other courts of appeals. Moreover, the issue in this case involves a sentencing rule of national application for which there is an overriding need for national uniformity. Accordingly, rehearing en banc of the panel's decision is appropriate under Fed. R. App. P. 35 and this Court's Rule 35-1.

ISSUE PRESENTED

Whether the panel's holding that the standard weight assigned to a dosage unit of LSD under Sentencing Guidelines § 2D1.1 must also be used to determine a defendant's eligibility for a mandatory minimum sentence under 21 U.S.C. 341(b) is contrary to *Chapman v. United States*, 500 U.S. 453 (1991), which held that the actual combined weight of the LSD and its carrier medium determine whether a defendant is subject to a mandatory minimum sentence under the statute.

STATEMENT

1. *The District Court Proceedings.* On March 12, 1992, defendant pleaded guilty to conspiracy to distribute LSD, in violation of 21 U.S.C. 841(a) and 846. At sentencing, the district court determined that the combined weight of the 14,200 dosage units of LSD and the blotter paper was 101 grams. Since defendant had a prior felony drug conviction, the district court sentenced defendant to the mandatory minimum 20-year sentence under 21 U.S.C. 841(b)(1)(A)(v).[1] This Court affirmed

1. When a drug offense involves "10 grams or more of a mixture or substance (Cont'd)

defendant's conviction, but * * * have agreed that the Supreme Court's interpretation of the statute in *Chapman*, rather than the standard dosage weight assigned to LSD in amended Guidelines § 2D1.1(c), controls the determination of the weight of LSD for purposes of applying the mandatory minimum sentencing provisions of 21 U.S.C. 841(b).

CONCLUSION

For the foregoing reasons, the petition for rehearing should be granted, and the suggestion for rehearing en banc should be accepted.

Respectfully submitted.

SHERRY SCHEEL MATTEUCCI
United States Attorney
District of Montana

KRIS A. McLEAN
Assistant U.S. Attorney
District of Montana

JOSEPH C. WYDERKO
Attorney
Department of Justice
Washington, D.C.

(Cont'd)
containing a detectable amount" of LSD, 21 U.S.C. 841(b)(1)(A)(v) provides a mandatory minimum sentence of ten years' imprisonment. If a defendant also has a prior conviction for a felony drug offense, Section 841(b)(1)(v) provides a mandatory minimum sentence of 20 years' imprisonment.

Appendix B

CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Government's Petition for Rehearing with Suggestion For Rehearing En Banc were served this *11th* day of April, 1995, by first-class mail, postage prepaid, upon the following counsel for appellant:

William M. Brooke, Esq.
Moore, O'Connell & Refling
P.O. Box 1288
Bozeman, Montana 59715

s/ Joseph C. Wyderko
JOSEPH C. WYDERKO
Attorney, Appellate Section
Criminal Division
U.S. Department of Justice
Post Office Box 899
Ben Franklin Station
Washington, D.C. 20044-0899
Phone: (202) 514-3608

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT FILED MAY 1, 1995

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEAL
FOR THE NINTH CIRCUIT

No. 93-30461
D.L. No. CR-91-00072-CCL

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

v

RICHARD LEE MUSCHIK,

Defendant-Appellant.

Appeal from the United States District Court
for the District of Montana

Before: WOOD[1], HUG, AND TANG, Circuit Judges.

The panel, as constituted in the above case, has voted to deny appellee's petition for rehearing. Judge Hug has voted to reject the suggestion for rehearing en banc, and Judges Wood and Tang have recommended rejection of the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and

1. Honorable Harlington Wood, Jr., Senior United States Circuit Judge for the Seventh Circuit Court of Appeals, sitting by designation.

no active judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35(b).

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX D — EXCERPTED TRANSCRIPT OF PROCEEDINGS DATED DECEMBER 2, 1993

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MONTANA
HELENA DIVISION

Criminal Docket No.

No. 91-40-M-CCL; No. 91-72-M-CCL

UNITED STATES OF AMERICA, PLAINTIFF

vs.

RICHARD LEE MUSCHIK, DEFENDANT

TRANSCRIPT OF PROCEEDINGS

BEFORE THE HONORABLE CHARLES C. LOVELL
UNITED STATES DISTRICT JUDGE

Taken at:
UNITED STATES COURTHOUSE
301 SOUTH PARK
HELENA, MONTANA 59601
DECEMBER 2, 1993

[18]

* * * * *

THE COURT: Very well.

Appendix D

Mr. Muschik, do you have anything further that you would like to say?

THE DEFENDANT: No, your Honor.

THE COURT: Are you ready for the Court to impose sentence?

THE DEFENDANT: Yes, I am.

THE COURT: And Mr. Brooke, is there any reason, legal or otherwise, why sentence ought not be imposed?

MR. BROOKE: No, your Honor.

THE COURT: The issue before the Court at this point is simply, it seemed to me whether this Court is obligated to follow the ruling of the United States Supreme Court in the Chapman case and whether the Court is obligated to enforce what Congress has enacted as a mandatory minimum sentence. And I think the answer to that is that it's the duty of the Court to follow those authorities in this case, under these particular facts.

I stated before that I think the sentence imposed was a little bit longer sentence of incarceration than this Court would have imposed without the mandatory minimum. [19] And that remains the case today. But I think the Court is compelled to follow the authority that Congress has laid down and that the Supreme Court of the United States has laid down.

And accordingly, it's the judgment of the Court that the defendant is hereby remanded to the custody of the Attorney General for a term of 20 years. And upon release from

imprisonment, the defendant will be placed on supervised release for a term of ten years.

* * * * *

(3)

Supreme Court, U.S.
FILED
OCT 31 1995
OFFICE OF THE CLERK

No. 95-156

In the Supreme Court of the United States

OCTOBER TERM, 1995

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD LEE MUSCHIK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

DREW S. DAYS, III
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 514-2217

BEST AVAILABLE COPY

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In the Supreme Court of the United States

OCTOBER TERM, 1995

No. 95-156

UNITED STATES OF AMERICA, PETITIONER

v.

RICHARD LEE MUSCHIK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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1. Respondent contends (Br. in Opp. 2, 6) that the government's petition for a writ of certiorari was untimely because the United States filed a suggestion for rehearing en banc in the court of appeals. That contention is incorrect. The United States filed, in a single document, a petition for rehearing *with* a suggestion for rehearing en banc, and the filing was clearly labeled as both. See Br. in Opp. App. 16a, 18a. That filing was effective as both a petition for rehearing under Rule 40 of the Federal Rules of Appellate Procedure—which tolls the time for filing a petition for a writ of certiorari until the petition for rehearing is denied or a subsequent judgment is entered (see Sup. Ct. R. 13.3; *Missouri* v. *Jenkins*, 495 U.S. 33, 45-46 (1990))—and a suggestion for rehearing

en banc under Rule 35 of the Federal Rules of Appellate Procedure.

Nothing in the Federal Rules of Appellate Procedure or the Ninth Circuit Rules precludes the filing of a petition for rehearing with a suggestion for rehearing en banc in one document, and this Court has noted that parties frequently combine the two pleadings in one document. *Missouri* v. *Jenkins*, 495 U.S. at 47 n.16. The Ninth Circuit Rules anticipate that the two pleadings will be combined in one filing; Rule 35-1 states that, "[w]here a suggestion of the appropriateness of a rehearing en banc is made pursuant to FRAP 35(b) *as a part of a petition for rehearing*, a reference to such suggestion, as well as to the petition for rehearing, shall appear on the cover of the *combined* petition and suggestion." 9th Cir. R. 35-1 (emphasis added). The advisory committee notes to Ninth Circuit Rule 40-1 differentiate, for the purpose of prescribing the number of copies to be filed, the situation "[w]here a petition for a rehearing does not include a suggestion for a rehearing en banc" from the situation "[w]here a petition for rehearing does include a suggestion for a rehearing en banc."

The Ninth Circuit also treated the government's papers in this case as both a petition for rehearing and a suggestion for rehearing en banc. The court of appeals' last order in the case states that "*[t]he panel*, as constituted in the above case, has voted to deny [the government's] petition for rehearing." Pet. App. 26a (emphasis added). The court therefore recognized that the government had filed a petition for panel rehearing under Rule 40. The court's order further states: "The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED." Pet. App. 27a. Thus, "the Court of

Appeals interpreted and actually treated the [government's] papers as including a petition for rehearing before the panel." *Missouri* v. *Jenkins*, 495 U.S. at 47. The 90-day period for filing a petition for a writ of certiorari runs from the date that the court denied the petition for rehearing, Sup. Ct. R. 13.3, and the petition for a writ of certiorari was filed within that period.

2. Respondent also suggests (Br. in Opp. 7) that this case should be argued in tandem with *Neal* v. *United States*, cert. granted, 115 S. Ct. 2576 (1995) (to be argued December 4, 1995), which presents the same issue. The issues have been fully briefed in *Neal*, in which (contrary to respondent's contention, Br. in Opp. 7), petitioner Neal is represented by counsel. Moreover, the fact that Neal received some benefit from the new LSD Guideline is not central to the government's argument in that case (*ibid.*). For this case, therefore, it is sufficient that the Court hold the petition pending the decision in *Neal* and then dispose of the petition as appropriate in light of that decision.

* * * * *

For the foregoing reasons, and the reasons set forth in the petition, the petition for a writ of certiorari should be held pending the decision in *Neal* v. *United States*, cert. granted, 115 S. Ct. 2576 (1995) and then disposed of as appropriate in light of the decision in that case.

Respectfully submitted.

DREW S. DAYS, III
Solicitor General

OCTOBER 1995